SERVED: October 7, 1992

NTSB Order No. EA-3687

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of September, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. JAMES E. NORRIS, Respondent.	)	Docket SE-12297

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on April 22, 1992, following an evidentiary hearing.[1] We deny the appeal. Prior to addressing the merits of the appeal, however, we must resolve a number of procedural matters.

Respondent has filed two briefs, both termed appeals. He may have been unaware that the notice of appeal, due 10 days

[1]The initial decision, an excerpt from the hearing transcript, is attached.

after the initial decision is issued (i.e., May 4, 1992), need be nothing more than a one-sentence statement. While such a notice was filed by his attorney, respondent concurrently submitted a 22-page "Initial Formal Appeal," with approximately 50 pages of evidentiary attachments. The Administrator replied, treating this first document as respondent's appeal brief (although the brief itself was not due until June 10, 1992). On June 9, 1992, respondent filed a "Formal Fifty Day Appeal Brief," a 45-page document also with additional attachments (sometimes referred to here as the second brief).

On July 7, 1992, the Administrator moved to strike the second brief, as well as the attachments to the Initial Formal Appeal, and copies of other documents that had separately been sent to the Board. These documents include a 30-page letter to President Bush, with an equal number of attachments, and various material in connection with, among other things, an employment grievance respondent had filed with the FAA. Respondent replied in opposition to the motion to strike.

On July 9, 1992, respondent filed a "First Supplement to the Formal Fifty Day Appeal Brief," with an attachment. The Administrator, on July 22, 1992, moved to strike this filing as well and, again, respondent replied.

We grant the motions, in part. We agree with the Administrator that the attachments to the Initial Formal Appeal,

and the three separately filed sets of documents[2] are not properly before the Board. They are new evidence that respondent has not sought or received permission to file. See 49 C.F.R. 821.49 and 50(c). This applies to the first supplement to the second brief, as well.[3]

We will not strike respondent's second brief. It was properly and timely filed, and there is nothing in our rules that prohibited respondent from filing a lengthy notice. That the Administrator wrongly assumed that the first document was the brief is no basis to deny respondent the opportunity he is provided under our rules. In light of our ultimate conclusions, however, we need not address the Administrator's request that, if the second brief is accepted, he be given an opportunity to respond. We will, however, strike the attachments to the second brief, for the same reasons as previously given.

In the initial decision, the law judge affirmed the Administrator's emergency suspension of respondent's airline transport pilot and flight instructor certificates.[4] The

[2] I.e., the May 25, 1992 letter to the President, with attachments; the June 17, 1992 memo to T. C. Accardi, with attachments; and the August 3, 1992 letter to F. Griffin, with attachments.

[3] In an attempt to avoid future filings of this sort by respondent, we point out that, so long as the Administrator has demonstrated that he had a legitimate reason to question respondent's qualifications, we will decline to consider other, allegedly improper, reasons respondent has suggested for such action. See discussion, infra.

[4] Respondent waived the requirement (see 49 U.S.C. 1429) that

emergency suspension was based on respondent's failure to undergo reexamination, as ordered by the Administrator, thus violating Section 609(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1429.

Under our decisions construing this section, we have held that, where the Administrator has reasonable grounds for requiring a reexamination, and the airman does not submit to one, the Administrator may suspend the airman certificate until proficiency is demonstrated. See, e.g., Administrator v. Phillips, 1 NTSB 615, 616 (1969), and Administrator v. Harrington, 1 NTSB 1042, 1043 (1971).

In this case, as grounds for requiring reexamination, the Administrator alleged that respondent failed successfully to complete two training courses (a July 1991 turbo jet flight course and a September-October 1991 light twin refresher course). The Administrator also alleged that respondent: 1) violated a clearance and became disoriented during a ground trainer exercise on September 9, 1991; 2) became disoriented and unable to locate the destination airport during a September 10, 1991 flight; 3) failed a proficiency check ride and was found unqualified in a Cessna 172 on September 17, 1991; and 4) was again found unqualified after a flight check on October 24, 1991.

Respondent's answer admitted his refusal to undergo reexamination. He alleged that he was required to submit to

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the Board dispose of this emergency proceeding within 60 days.

training and evaluations despite his objections, and without being provided flight currency hours to which he was entitled. He also claimed that he was not advised that he was being evaluated, and believed he was simply engaging in currency flights. He denied being unqualified or performing below course minimum standards.[5] He claimed, instead, that he was being discriminated against during training, evaluation, and check rides. Because this last issue is central to respondent's position throughout the proceeding, and is the primary matter he raises on appeal, we address it first.

On March 17, 1992 prior to the hearing, the law judge granted the Administrator's motion to exclude evidence regarding discrimination via selective prosecution and treatment of others. He viewed evidence of the FAA's treatment of others as irrelevant to the applicable standard here (i.e., did the Administrator have reasonable grounds to question respondent's competence). In contrast, however, he also considered the motivation of involved FAA employees as relevant to whether the FAA's behavior was reasonable. Therefore, he allowed examination of the witnesses to inquire into their feelings toward respondent.

[5]He did, however, admit to certain faults in his performance. See Answer at Paragraphs 4 and 7 ("had difficulty locating Santa Paul [sic] Airport" and "was unable to perform certain tasks satisfactorily during this [October 24, 1991] flight").

Without deciding whether the law judge's approach was appropriate in allowing questioning regarding FAA witnesses' motivations and feelings toward respondent, we have no difficulty denying respondent's claims that he was entitled to present evidence of racial discrimination generally or that the law judge's decision denied respondent due process. As we stated in Administrator v. Ringer, 3 NTSB 3948, 3949 (1981):

> The law judge in cases such as this one fulfills that [statutory] duty by reviewing the Administrator;s [sic] re-examination decision in light of the Board-imposed requirements that such requests, objectively viewed, be reasonable. This does not mean that the law judge or the Board my [sic] invalidate a re-examination request simply because some factor, or factors, other than pilot competence may have been responsible, in whole or in part, for the incident or accident underlying it. It means only that, the Administrator, to have his request upheld, must demonstrate a reasonable basis for believing that pilot competence could have been a factor [in respondent's performance]. Where such a basis has been shown, it is of no legal significance that the airman involved may differ with the Administrator's judgment as to the necessity for the examiniation [sic].

Thus, even where there may be other reasons for the Administrator's action, if the evidence raises a reasonable question about respondent's qualification to perform under particular certificates, the Administrator's demand for reexamination will be affirmed. Accord Administrator v. Westmoreland, 5 NTSB 871 (1986), recon. den. 5 NTSB 877 (1986), dismissed as moot Westmoreland v. NTSB, 833 F.2d 1461 (11th Cir. 1987).

The reason for this position should be clear. Reexamination is not a sanction; it is a request in connection with

certification in the interests of safety. Administrator v. Smith, 2 NTSB 2527, 2530 (1976). It is the Administrator's duty, in carrying out his aviation safety responsibilities, to cause to be reexamined any airman that appears unqualified. It is our duty, also as a safety and public interest matter, to affirm that reexamination order if objective evidence is offered to support the Administrator's concerns, regardless of any other matters involving that airman or other possible reasons for the FAA's action. Accordingly, we affirm the law judge's procedural ruling.[6]

To prove that he had a reasonable basis to order reexamination, the Administrator offered the testimony of Inspectors Meyer, Swanson, and Christopher, all of whom worked with respondent. Inspector Meyer flew with respondent on the September 10th and 17th flights. Inspector Christopher was the check ride inspector for the October 24th flight. Inspector Swanson was respondent's supervisor. In addition to participating as an observer in the October 24th flight and as the controller for the September 9th ground trainer exercise, Inspector Swanson spoke with instructors and other personnel at the FAA training center, to investigate the possible causes of

[6]We further note that respondent has other forums for his discrimination claims and is pursuing them. The merit to them, if any, may be resolved separately and, handled in that fashion, do not compromise the Administrator's responsibility to ensure pilot competence through demanding reexamination when, for whatever reason, a reasonable doubt has been raised.

respondent's unsuccessful completion of the two courses.

All three witnesses testified, based on their personal observations of the above flights, that respondent did not have the necessary skills, and that many of his errors were of the type that would not be expected from much less experienced pilots. See, e.g., Tr. at 182 (respondent lacked understanding of fundamentals). Errors included failure properly to use various cockpit instruments, difficulty with navigation, inability to make basic calculations such as airspeed and weight and balance measures, and failure to remain at assigned altitude or to control aircraft attitude. In the October 24th flight, respondent was found unsatisfactory in nine areas, when just one would have resulted in failing successfully to complete the exercise. Tr. at 562. Inspectors Swanson and Meyer testified to having explained his inadequate performance to respondent and reviewed certain areas with him as supplemental assistance. According to them, respondent did not question the inspectors' analysis of his performance.

At the hearing, respondent offered a different version of events. His failure to perform satisfactorily during flights and ground training was due to a misunderstanding of instructions, or to harsh and unfair treatment. For example, his poor performance at the training courses was due to a combination of lack of currency training (not provided him by the FAA, as allegedly required) and to instructors either being unusually hard on him

or intending to fail him.[7] Allegedly, the October 24th flight went poorly because, by this time, the pressure of all these events made him unable to fly, and has made him seek psychiatric care. Second brief at 3.

The law judge upheld the Administrator's order, finding there was sufficient evidentiary basis in the record to support reexamination. He also concluded that respondent was not racially discriminated against in connection with the courses or flight evaluations. Tr. at 798. In reaching this finding, he noted respondent's original, written evaluation of the July training course, which contained no reference to racial discrimination.[8] The law judge also noted that respondent's one witness offered no support for his claims.[9] Finally, the law judge found that respondent had no discrimination complaint directed towards the check airman for the October 24th flight,

[7]Respondent claimed that his participation in a class action suit alleging racial discrimination by United Airlines caused certain FAA employees to conspire against him and rate him badly, and claimed that the FAA only took action against him when it learned of his involvement (i.e., when his name appeared in a newspaper article concerning the suit).

[8]Respondent's evaluation stated that, although the instructor might have been acting in good faith, respondent was confused and uneasy.

[9]This witness testified that, at the time of the second training course, respondent did not complain about discrimination by his instructor, but appeared to be nervous and unhappy because the course was difficult for him. Although this witness testified overhearing instructors discussing respondent's poor abilities as a pilot, he also believed that respondent was having difficulty with the instructors because they were concerned with his skill inadequacies. Tr. at 418-435.

yet that airman testified that respondent did not successfully complete that flight check. As noted earlier, the Board has declined to inquire behind FAA reexamination orders, provided the Administrator establishes a legitimate basis to question competency. Thus, the finding of no racial discrimination was not necessary, although it further supports the law judge's conclusion that the Administrator's action had a reasonable basis.

The law judge's decision is supported by a preponderance of the evidence. He was required to make credibility findings resolving conflicting testimony about respondent's performance and capability, and respondent has not shown those findings to be arbitrary or capricious. See Administrator v. Jones, 3 NTSB 3649, 3651 (1981), and Administrator v. Klock, NTSB Order EA-3045 (1989), slip op. at 4 (law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations...were put forth").[10]

Respondent's suggestions that he was not prepared for the various flight evaluations and training and that he was medically unfit for the October 24th flight check offer no basis to reverse the initial decision. Respondent possessed certificates that allowed him to act as a pilot-in-command and flight instructor. The Administrator is entitled to be assured that at all times

[10]We also note that respondent offered no contrary expert testimony regarding his current abilities as a pilot.

respondent has the necessary skills to perform the certificated functions safely and properly, and the time or manner in which the Administrator obtains information indicating otherwise is irrelevant.[11] One incident is sufficient to call a pilot's competency into question. In this case, the law judge accepted testimony of a continuing inability, despite additional training and assistance, to bring skills up to required levels. The record indicates that, if anything, FAA employees may have allowed respondent greater leeway than might have been appropriate.[12]

It is equally irrelevant that at some prior time respondent was pronounced qualified. To retain these certificates, respondent has the responsibility to take whatever actions are necessary to maintain his proficiency.[13]

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[11]Thus, it is irrelevant that respondent may have been unaware that the September 17th flight was a check ride. Regardless of its title or purpose in other contexts, it raised doubts concerning respondent's qualifications. Moreover, as was the law judge, we are unpersuaded by respondent's claim that he was unfit to fly on October 24th. The doctor's letter presented to Inspector Swanson before the flight and admitted into evidence (Exhibit R-3) supports no such conclusion. (Respondent is probably well aware that, had he obtained a certificate stating that he was psychologically unfit, this would have raised questions concerning his medical certificate, which is also subject to reevaluation by the Administrator at any time.)

[12]Inspector Swanson testified that safety would not be implicated because, despite the leeway he had accorded respondent, he could ensure that respondent performed only ground duties. He later admitted, however, that he could not preclude respondent from flying when off-duty. Tr. at 276-277, 343.

[13]Our conclusion does not change even if we assume that the FAA did not provide respondent with flight time to which he was

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motions to strike are granted to the extent set forth in this opinion; and

2. Respondent's appeal is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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entitled. Upon reliable evidence that respondent could not perform properly under the certificates he had been issued, reexamination is in order. Respondent's argument that reexamination may not properly be demanded unless an accident or incident occurs is inconsistent with precedent. See Westmoreland, supra.